Office Supreme Court, U. S.
FILED
OCT 1 1920
JAMES D. MAHER,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 17, ORIGINAL.

THE STATE OF NORTH DAKOTA,

Complainant,

vs.

THE STATE OF MINNESOTA,

Defendant.

MOTION TO SET CASE FOR FINAL HEARING.

WILLIAM LANGER,
Attorney General of the State of North Dakota,
Solicitor for Complainant,

M. H. BOUTELLE,
JOHN LIND,
I. C. PINKNEY,
Of Counsel for Complainant.

Supreme Court of the United States.

OCTOBER TERM, 1919.

NO. 17, ORIGINAL.

THE STATE OF NORTH DAKOTA,

Complainant,

vs.

THE STATE OF MINNESOTA,

Defendant.

To the Honorable the Justices of the Supreme Court of the United States:

Comes now the State of North Dakota, complainant in the above entitled matter, and moves the Court, the record herein having been filed and printed in accordance with the rules and orders of the Court, that said cause be set down and assigned for final hearing and argument.

THE STATE OF NORTH DAKOTA,
By WILLIAM LANGER,
Attorney General,
Solicitor for Complainant,

M. H. BOUTELLE,
JOHN LIND,
I. C. PINKNEY,
Of Counsel for Complainant.

Supreme Court of the United States.

OCTOBER TERM, 1919.

NO. 17, ORIGINAL.

THE STATE OF NORTH DAKOTA,

Complainant,

vs.

THE STATE OF MINNESOTA,

Defendant.

To the above named defendant, the State of Minnesota, and the Honorable Clifford L. Hilton, Attorney General of said State:

You are hereby notified that the attached and foregoing motion will be presented to the Court on Monday, the 11th day of October, A. D. 1920, at the opening of the Court on said day, or as soon thereafter as counsel can be heard.

Dated September 23, 1920.

WILLIAM LANGER,
Attorney General, State of North Dakota,
Solicitor for Complainant.

M. H. BOUTELLE,
JOHN LIND,
I. C. PINKNEY,
Of Counsel for Complainant.

Office Supreme Court, U. S.
FILED
MAR 3 1917
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES.

No. 27.

ORIGINAL ACTION.

THE STATE OF NORTH DAKOTA,

Complainant,

vs.

THE STATE OF MINNESOTA,

Defendant.

ANSWER.

LYNDON A. SMITH,
Attorney General,
St. Paul, Minnesota.

UNITED STATES OF AMERICA
SUPREME COURT

THE STATE OF NORTH DAKOTA,

Complainant,

vs.

THE STATE OF MINNESOTA,

Defendant.

ANSWER.

The Answer of the State of Minnesota to the Bill of Complaint.

Now comes the State of Minnesota, the defendant, and says for answer thereto:

I.

That in answer to the second paragraph of the bill herein the defendant states that no controversy has arisen between the State of North Dakota and the State of Minnesota in any respect except as the same is before this Court in this action, and that an effort to settle the controversy herein set forth has been made by the legislature of the State of Minnesota by the appointment of a committee of the legislature for that purpose, which commit-

tee in good faith, on the ninth day of February, 1917, met a committee of the legislature of North Dakota for the purpose of discussing with said committee the elements of this controversy and the possibility of its settlement, but without avail.

II.

That the complainant herein has no interest as a state in the relief or any part of the relief demanded by the bill herein, in this, that all of the damages done or likely to be done, if any have been done or may hereafter be done, of the nature of those alleged in the bill, have been done or will be done to residents of the state, and the complainant is not the real party in interest, but only individual citizens and municipalities of that state and persons resident therein and these wholly as to their individual property, and the defendant therefore pleads in bar to this action and all of it, that such general governmental interest of the state of North Dakota in its citizens is not such that complainant may bring against the State of Minnesota an action to recover damages for injury to, or to prevent such future injuries of like kind to, the property of its individual citizens. And the defendant further alleges that its constitution contains the following clause, to-wit:

> "The state shall never contract any debts for works of internal improvements, or be a party in carrying on such works, except in cases where grants of land or other property shall have been made to the state, especially dedicated by the grant to specific purposes, and in such cases the state shall devote thereto the avails of such grants, and may pledge or appropriate the revenues derived from such works in aid of their completion."

That no grant has been made to the State of Minnesota for the purpose of constructing ditches and none have been constructed by the state except in aid of public health, but said quoted paragraph is not binding upon counties and other subdivisions of the state. That the reasons for the construction of so much of the Mustinka Ditch as lies between the so-called delta zone and Lake Traverse is as stated on page seventeen of the printed bill herein and has been so found by the district court in and for the County of Traverse, State of Minnesota, a court of general jurisdiction. That the benefits to health secured by the construction of the said Mustinka Ditch were shared alike by the residents of all the lowlands along both sides of the Bois de Sioux River.

III.

Answering the third paragraph of said bill the defendant admits the boundary line between the two states, parties hereto, to be as alleged and the defendant alleges that the general character of the territory along both sides of said boundary line at the places in controversy in the pleadings herein is not that of a practical level prairie formation and is not uniform in character, but the land along said boundary line was in its natural state marshy and low; that while it slopes gradually toward the northwest in the northerly portions of the territory referred to herein, it falls abruptly and sometimes to the extent of ten (10) feet to the mile at the southern part of the territory described and referred to in this pleading, and the water in the region herein described has an ordinary elevation of nine hundred fifty-six (956) feet at the mouth of

Rabbit River and nine hundred seventy-four (974) feet at the surface of Lake Traverse; that said last named figure is the elevation referred to as sea level datum, as determined by the United States Geological Survey and shown on the chart of the quadrangle prepared under the direction of Charles D. Walcott, director, and surveyed by George T. Hawkins and J. T. McCoy in 1902.

IV.

Answering the fourth paragraph of said bill the defendant admits that the above mentioned Lake Traverse was and is under ordinary natural conditions a low, shallow body of water, a large part of whose area was essentially a marsh, but the defendant denies that the waters thereof have a mesne surface elevation of nine hundred seventy-two (972) feet above sea level, and alleges that during a normal stage of water and an average season, so far as rainfall is concerned, it was nine hundred seventy-four (974) feet above sea level; that the Bois de Sioux River was and is the outlet, and the waters of both said lake and river flow northerly; the banks of said river were relatively low, to-wit: three (3) to five (5) feet, and the width of the channel varied from one (1) to four (4) rods; during the stages of high water during spring freshets, et cetera, the level of its waters was raised above its banks and limited areas along its course overflowed for a brief period and did not cause serious or permanent damage or injury to any large area of the lands bordering the said river on either side, but the same area as was inundated as claimed in the bill herein, or greater area was occasionally inundated under and during conditions existing prior to 1915, at times of freshets and excessive rainfalls, and

always in times of ordinary freshets and very heavy rains more or less damage was done. That the damage so done was less serious and permanent than that done in 1915 and 1916 only because of the less improvement of the area flooded.

V.

Answering the fifth paragraph of the bill the defendant alleges that the water of Lake Traverse gradually flows in a northeasterly direction and the waters of the Bois de Sioux River in a northerly direction between Minnesota and so much of South and North Dakota as lies south of a point opposite the mouth of the Rabbit River to the outlet of Lake Traverse; that on the west of said river there is a slope toward the said Bois de Sioux River and slightly toward the north, to-wit: about one (1) foot to the mile; that the mesne elevation of said land in North Dakota in the section here involved varies from nothing to twenty-four (24) feet above the mouth of Rabbit River; and of the lands lying in North Dakota westerly from the Bois de Sioux River are of elevation as follows: Four (4) miles west of the mouth of the Rabbit River, twenty-four (24) feet higher than the water at the mouth of the Rabbit River; that four (4) miles west of the Bois de Sioux River on the state line between North Dakota and South Dakota, fifty-six (56) feet higher than the water of said Bois de Sioux River; and the land west of the said Bois de Sioux River between the south line of North Dakota and a point opposite the mouth of the Rabbit River is higher on the average than the land on the east side of the Bois de Sioux River east of the same area; that points within eight (8) miles west of the southeast corner of North Dakota rise

as much as one hundred (100) feet higher than the level of the Bois de Sioux River; all the land west of the said river and lake in South Dakota, except a narrow strip, is hilly; that on the east of said river and lake there is a comparatively level area for approximately twenty (20) miles east, and the general slope of said area is toward said lake and river toward the north, and the average elevation of the east line of said twenty (20) mile strip is approximately forty (40) feet above the level of said lake and river; that said area, though not technically nor accurately described as the prairie zone (but is mostly the bed of a pre-historic lake) may be so termed for the purposes of this action. The defendant alleges that from the west shore of Lake Traverse and from two (2) miles more or less west of the Bois de Sioux River in South Dakota rise a series of hills which extend back for twelve (12) to fifteen (15) miles, more or less, and northward into North Dakota, which hills rise to a height of eight hundred (800) feet or more above the said lake and river and from these hills flows northerly a river known as Wild Rice River, which river, before it reaches a point west of the mouth of the Rabbit River, flows easterly into the flat land west of the Bois de Sioux River, and in times of high water casts large quantities of water into the region claimed in this action to have been flooded and damaged, and in the years 1915 and 1916 did so cast large quantities of water into and upon the flooded area and those waters contributed largely, but indefinitely, to the flooding of said area and the damage caused by such flooding and inundation. That this river is omitted from the map accompanying the bill herein as Exhibit "A" thereof.

VI.

Answering the sixth paragraph of said bill the defendant admits that immediately east of said prairie zone in Minnesota is what may be named a "moraine zone", except that defendant denies that its elevation is approximately twelve hundred (1200) feet or any other or different number of feet than, to-wit: eleven hundred (1100) feet, and refers to the complainant's Exhibit "A" as justification of defendant's allegation as to the approximate average elevation of said moraine zone and as an indication of its hilly character.

VII.

Answering the seventh paragraph of said bill the defendant alleges the facts to be that the water of the said "moraine zone" flows into three definite basins. First: the Pomme de Terre basin to the east; Second: Rabbit River basin to the northwest; and, Third: the Mustinka basin to the southwest. That the Rabbit River basin is the confluence of many small creeks and water courses from the westerly side of the moraine zone, and these waters tend to collect in a marsh largely in the southwestern portion of township one hundred twenty-nine (129), range forty-five (45), which marsh is locally known as the "Tintah Slough" and said waters flow hence through the Rabbit River to the Bois de Sioux; that there is between this marsh and surrounding country a slight ridge shown upon complainant's Exhibit "A" by a dotted line shaded yellow through the north tier of sections of township one hundred twenty-eight (128), range forty-

five (45); that south of said ridge is a low area approximately like that described by complainant in the seventh paragraph of its bill and which area alone is properly called in connection with the Mustinka River basin the "delta zone"; that said delta zone is not level but slopes northwesterly at an average rate of about five (5) feet to the mile as is shown by the contour lines on complainant's Exhibit "A", which slope was sufficient to cause a reasonable drainage of the surface in ordinary seasons.

VIII.

Answering the eighth paragraph of said bill the defendant says that the overflow of the Mustinka delta zone above described was not sufficient to permanently inundate or saturate the soil, but only to do so in the spring after snowfall was heavy or at other seasons after unusual rainfall and then only for a relatively short time after the spring freshet was over or the unusual rainfall had ceased. This zone was practically all under cultivation for many years prior to 1915.

IX.

Answering the ninth paragraph of said bill the defendant alleges that the Bois de Sioux River north of the point of confluence with the waters of said Rabbit River has banks that are subject to overflow in high water and were overflowed and the land at each side of its said banks inundated during the time mentioned in complainant's bill; that the lands particularly described therein were inundated and flooded.

X.

Answering the tenth paragraph of said bill the defendant alleges that the said Mustinka River was a more rapid stream through the prairie zone to its outlet than was the Bois de Sioux River in the territory involved herein, and actually descended twenty-one (21) feet in the last fourteen (14) miles of its course, and to the mouth of the ditch hereinafter referred to from the west side of the moraine zone descended thirty (30) feet, which is an average of nearly five (5) feet to the mile; that the rate of its current conformed to the slopes just alleged; that the elevation of said Rabbit River at its source was somewhat higher than that of the Mustinka River at its point nearest to the source of the Rabbit River, but denies that the source of the Rabbit River, under normal conditions, was in said Mustinka delta zone, but admits that its channel was more clearly defined and its fall greater as it flowed toward the Bois de Sioux, and at ordinary stages a great part of the water accumulated and collected in said delta zone as aforesaid, to-wit: ninety (90) per cent, found its outlet through the Mustinka River. Defendant alleges and admits that at extremely high stages of water a small proportion of such waters, to-wit: not to exceed ten (10) per cent, found their outlet and flowed through the Rabbit River to the Bois de Sioux River. The defendant further alleges that whereas in a state of nature the headwaters of the Rabbit River were higher than the delta zone, as alleged by the complainant, after the completion of the ditching projects in and about said delta zone, to-wit: after 1914, and continuously since to the present time, there were and have been ditches through said "Tintah

Slough" and into Rabbit River, and by said ditches more water at all the times during which loss or damage has been alleged to have occurred, flowed and has flowed proportionately and absolutely from said "Tintah Slough" and also from the Mustinka delta zone to and through said Rabbit River than when no ditches or other improvements had been made, or when there was no connection except such as existed when there had been no interference with the natural surface or drainage of the land in that vicinity.

XI.

Answering the eleventh paragraph of said bill the defendant alleges that under normal and natural conditions the entire flow of the Mustinka delta area was through the Mustinka River into Lake Traverse, which lake naturally, and particularly in times of high water, constituted an impounding and distributing reservoir and thereby the waters of the Mustinka River were retained and gradually allowed to discharge therefrom through the Bois de Sioux River and thus to protect the people along the valley of the Bois de Sioux River from injury from overflows, whereas that water flowing through the Rabbit River fell into the Bois de Sioux River at a point where there were neither impounding nor distributing reservoirs and where said water would impede the flow of said Bois de Sioux River and set it back and cause to flow over upon the people and land upon its borders water in a disastrous amount. The defendant alleges that in spite of the impounding of said waters in Lake Traverse there has been occasional overflow of water therefrom to a greater extent than the Bois de Sioux could carry within its banks, and

the overflow and the consequent injury therefrom have been repeated in years past when all of the conditions were normal and natural, and the defendant alleges that by reason of the physical conditions hereinbefore described or those described in the bill of complaint, all the waters impounded in said Lake Traverse did not find their outlet nor were they accommodated or disposed of through channels or flowage as such channels or regions of flowage naturally existed. In times which were not normal as to rainfall or spring freshets the flooding was similar to, and sometimes greater than that in 1915 and 1916.

XII.

Answering the twelfth paragraph of said bill the defendant alleges that the entire area described as injured by the flooding thereof was settled at different times extending backward from 1915 to 1880 and the lands described in said bill had been improved at different times from 1880 to 1915, but mostly during extremely dry periods which occurred the first about 1892 to 1895 and the next 1902 to 1904 inclusive. That said lands were largely marshy and swampy and valuable only in dry seasons when they were indeed fertile and productive, but said lands were never highly valuable because of their being subject to overflow by extremely high water.

XIII.

Answering the thirteenth paragraph of said bill the defendant alleges that the canal or ditch therein called "Mustinka State Ditch" began in township one hundred twenty-eight (128), not one hundred forty-eight (148);

that it had an average width of about twenty-five (25) feet; that the area prior to the construction of the second Mustinka State Ditch, in which waters were accumulated, was less than sixty (60) square miles and said sixty (60) square miles were overflowed only in times of excessive high water.

XIV.

Answering the fourteenth paragraph of said bill the defendant says that the flow of the waters from both the Mustinka delta zone and the "Tintah Slough" respectively were slower than the same were after the channels of the Mustinka and Rabbit Rivers respectively had been straightened and in some places enlarged by the ditches which have been referred to and by the other ditches which were dug in the Rabbit River for the purpose of enlarging the same, and branches thereof, and accelerating the flow of water through them. That at all times of high water, and especially at the times when there was high water in said Rabbit and Mustinka rivers in their natural condition, these rivers were insufficient to carry off the waters falling within their drainage basins without the same overflowing their banks and inundating the country lying between said rivers and the Bois de Sioux and particularly the country bordering said Bois de Soux River, including the northern portion of the country described in the bill herein.

XV.

Answering the sixteenth paragraph of said bill the defendant alleges that in conformity to the provisions of the act of the legislature set forth in full in paragraph

sixteenth of said bill of complaint, and by aid of a supplemental appropriation therefor made in 1915 and for the purpose of improving the public health of the people living in the low land drained and about to be drained by the construction of a ditch along the general line and direction of the Mustinka River, such ditch was built, the average width of which ditch was not sixty (60) feet but was thirty (30) feet for the first two (2) miles, and forty (40) feet thereafter, and which ditch had an average depth not of thirteen (13) feet, but of six (6) feet from the point where the original drainage into the south branch of the Mustinka River emptied into the true Mustinka River in or about section eighteen (18) of township one hundred twenty-eight (128) north of range forty-five (45) west; that said ditch was open for a distance of approximately fifteen (15) miles. The defendant admits that as a result of said construction, so far as the same followed the general course of the said Mustinka River, the latter was for the most part, but not wholly nor in all places straightened or widened or deepened, and admits that the new and artificial channel superseded the previously existing natural channel; and except as hereinbefore in this paragraph admitted, the defendant denies each and every allegation of said paragraph seventeen.

XVI.

Answering the seventeenth paragraph of said bill the defendant alleges that with the opening of the spring of 1915 the second Mustinka State Ditch herein last before described carried ninety (90) per cent, and no more, of the waters of that portion of the moraine zone which flowed through the Mustinka delta zone, and the waters

of said delta zone and of the basin of the Mustinka River south and southeasterly and easterly of said delta zone that were within the same river basin into Lake Traverse, and that from said time the Rabbit River carried all of the waters of its basin and approximately ten (10) per cent of the waters of the Mustinka basin and a large amount of the waters of the Otter Tail River into the Bois de Sioux River and obstructed the channel of said river and set back and prevented the flow of the waters of said river and thereby contributed to the flooding of the lands described in the bill herein. Defendant further alleges that in the construction of each and every ditch which carried water into the Rabbit River there was every effort made and successfully made to carry its due share of the water of the delta zone into Rabbit River and states that during all the times mentioned in said bill since the completion of the ditches mentioned in paragraph seventeen thereof and ever since the time that they affected the flowage of any waters from the delta zone as aforesaid, the Rabbit River has carried its full, usual and natural amount of said water through its channel and emptied the same into the Bois de Sioux River; and the defendant expressly alleges that no greater than the natural proportion of the waters of the delta zone which flowed through the valley of the Mustinka River has ever since flowed through the same valley and been carried into Lake Traverse, and that no other different or larger proportion of water has been so carried than has ever been carried by the natural operation of said stream as compared with the Rabbit River, except as the natural flow into Rabbit River has been increased as herein alleged.

XVII.

Answering the nineteenth paragraph of the said bill the defendant alleges that the acceleration of the waters flowing through the Mustinka ditches was only such as to reduce the time of their flowing from the place where the first Mustinka ditch began, to Traverse Lake, from less than two (2) days to about twenty-four (24) hours, and the defendant alleges that such water never required from twelve (12) to twenty (20) days in flowing from said moraine and delta zones through the Mustinka River to the outlet in Lake Traverse and that the acceleration caused by the digging of the ditches aforesaid was never, in times of high water, more than twenty-five (25) per cent.

XVIII.

Answering the allegations in the twentieth, twenty-first, twenty-second, twenty-third, twenty-four, twenty-fifth and twenty-sixth paragraphs of the said bill, defendant says that it is without knowledge as to the exact facts alleged in the bill which are not squarely repugnant to and contradictory of the exact allegations of this answer. Defendant alleges that neither its unlawful acts or any other acts done, permitted or tolerated by the State of Minnesota have caused the complainant or its citizens or any of them to suffer a loss or damage exceeding or of the sum of one million ($1,000,000) dollars or of any other measurable sum or amount whatever or has caused proximately any loss to complainant, or its citizens. It alleges that such overflow and inundation as occurred in the locality described in the bill in the seasons of 1915 and 1916 were caused by an unusual and excessive rain-

fall in the basin of the Bois de Sioux River and Lake Traverse; that said excessive rainfall occurred in the years 1914, 1915 and 1916; that the water from said continuous and excessive rainfall flowed down both sides of the Bois de Sioux basin and accumulated to a depth of several feet, to-wit: two (2) to five (5) feet, and no more, above the average normal and natural surface of said Lake Traverse and Bois de Sioux River for a considerable time, to-wit: one (1) to two (2) months; that this accumulation of water flooded the strips of low land along said lake and river in the same way and to the same extent that these lands had been flooded at other times of high water; that the drainage done by the State of Minnesota and its various subdivisions into said lake and river, or through them, was not the cause of the high water and was of so little effect as to be immeasurable and cause no computable loss; that the waters so cast into said lake and river were accelerated by the ditching projects of the State of Minnesota, and its subdivisions and contributed to the water which inundated the lands described in the bill; that said water was collected and cast with greater rapidity and volume into the said lake and river as a result of the necessary drainage of low areas located in the State of Minnesota and to the east of the Bois de Sioux River and also of low areas in the states of South and North Dakota and brought by drainage systems and natural streams into said lake and river in volumes that could not be separately measured so as to determine the part of the waters brought from one state or from the other state or states by reason of the common and similar rainfall, ditches and canals existing in the several states and all contributing to the raising of the waters of said lake and

river. That the benefits from the construction of said ditches in the State of Minnesota were many times greater than the damage and loss caused by the overflow of the said Lake Traverse and Bois de Sioux River; that as a result of such drainage hundreds of farms have been benefited and thousands of acres of land rendered dry and tillable, beneath the surface of which land the water table was, during the growing season before such ditching, only a few inches, or at most a foot or two; that the greatest good to the greatest number of people in the basin of the Bois de Sioux River required that the lands which have been drained should be drained, and the drainage of said land has been along the line of the natural flow of said water and through the depressions, water courses, creeks and rivers which were by nature the outlets for the flowage of the water carried by them at the time at which the damage complained of occurred; that the drainage complained of in the bill was largely and decisively in aid of the health of the communities from which the waters were taken, and tended to the health of many times more people than were menaced or endangered as to their health by the overflows complained of in the bill; that the particular flooding set forth in the bill was due not only to the excessive rainfall and the ditching in both North and South Dakota, and the overflow of natural streams in both North and South Dakota and Minnesota, but also to the overflow of that certain river known as the Otter Tail River which cast large quantities of its waters in the Rabbitt River, which waters there mingled with those of the Bois de Sioux River and set back toward, and possibly into, Lake Traverse; that the prevention of the flow of water through the ditches already con-

structed, as well as the prevention of the carrying out of the various projects for the further drainage of the lands in Minnesota, throughout the entire basin of the Red River Valley, would cause far greater damage, and to far more people, than would the continuation of the flow of water through the ditching systems involved herein and the further careful and scientific drainage of the wet lands along the borders and sides of the Red River Valley, including that part of it referred to in the bill.

Having thus made a full answer to all the matters and things contained in the bill this defendant prays that the bill be dismissed and for judgment for its costs in this behalf incurred.

LYNDON A. SMITH,
Attorney General,
State Capitol,
St. Paul, Minnesota.

STATE OF MINNESOTA,
County of Ramsey. ss.

Lyndon A. Smith being first duly sworn says that he is the Attorney General of the State of Minnesota; that he has read the foregoing answer and that the same is true to the best of his belief.

LYNDON A. SMITH.

Subscribed and sworn to before me this 24th day of February, 1917.

G. K. SPANGENBERG,
(Notarial Seal) Notary Public,
Ramsey County, Minnesota.

My commission expires March 11, 1922.